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NO. 95-1488

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

HAROLD J. SWIFT

Petitioner,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, STATE OF TEXAS, AND JAMES A. LYNAUGH, EXECUTIVE DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Respondents,

On Petition For a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a heightened pleading standard still applies to permit dismissal of a 42 U.S.C. § 1983 action against a government official in his individual capacity.

PARTIES TO THE PROCEEDING

Petitioner

Harold J. Swift

Respondents

Texas Department of Criminal Justice
Institutional Division

State of Texas

James A. Lynaugh,
Executive Director of the Texas Department of Criminal Justice

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BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the Texas Department of Criminal Justice. Institutional Division, State of Texas, and James A. Lynaugh, Executive Director of the Texas Department of Criminal Justice, Petitioners herein, by and through the Attorney General of Texas, and file this Petition in Opposition.

Statement Of The Case

On May 3, 1993, Petitioner, hereinafter "Swift," initiated this lawsuit by filing a complaint in the United States District Court for the Southern District of Texas, Galveston Division. Pet. App. 4-10. Swift brought his action against the Texas Department of Criminal Justice, Institutional Division (TDCJ-ID), the State of Texas, and James Lynaugh (Lynaugh), the former Executive Director of the Texas Department of Criminal Justice, pursuant to 42 U.S.C. § 1983, and seeking money damages for alleged violations of the Eighth Amendment.[1]

Specifically Swift alleged that on or about May 2, 1992 and May 3, 1992, unnamed officials at a Texas penitentiary infirmary were deliberately indifferent to his serious medical needs as the result of unspecified policies and customs for the evaluation of inmates' medical needs, that were allegedly instituted and enforced by Lynaugh. Pet App. 5-9. A scheduling conference was held on September 2, 1993, at which time the deadline for discovery on immunity issues was set for October 15, 1993, and the deadline for the filing of dispositive motions was set for October 29, 1993. On September 16, 1993, TDCJ-ID, the State of Texas and Lynaugh filed a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(1) and 12(b)(6). Swift responded to this motion on October 6, 1993. Although Swift contended that dismissal was improper as to Lynaugh in his individual capacity, he did acknowledge that dismissal was proper as to Lynaugh in his official capacity, the State of Texas and TDCJ-ID. No discovery requests were ever made.

On November 4, 1993, Magistrate Judge John R. Froeschner issued a Report and Recommendation that the motion to dismiss

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[1] Lynaugh was the Executive Director of the Texas Department of Corrections from 1987 until it was renamed the Texas Department of Criminal Justice in 1991. Lynaugh continued as the Executive Director of the renamed agency until 1993.

be granted and that all claims be dismissed. Pet. App. 13-18. At no time did Swift request leave of court to file an amended complaint. On November 22, 1994, after a *de novo* review, the district judge adopted the report and recommendation of the magistrate judge and dismissed the case. Pet. App. 1. Swift timely appealed, and the Fifth Circuit affirmed the district court's dismissal without an opinion on December 19, 1995. Pet. App. 2-3. Swift subsequently filed his petition for writ of certiorari.

Summary Of The Argument

Swift argues that the decision rendered by the Court of Appeals for the Fifth Circuit in *Schultea v. Wood*, 47 F.3d 1427 (1995) (en banc) ignores the holding of *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). However, this is not the proper case for consideration of this issue. Swift's case was dismissed not as the result of a "heightened pleading standard," but because even if Swift had conducted discovery, he could never had amended his allegations to prove any set of facts which would demonstrate more than mere negligence in the provision of medical care to him. Thus, Smith would not have been able to demonstrate a constitutional violation, because negligence "does not state a valid claim of medical mistreatment under the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 98, 105-06 (1977).

Moreover, Swift is in error regarding the holding of *Leatherman*, which is applicable only in civil rights cases alleging municipal liability under 42 U.S.C. § 1983. This Court expressly reserved the issue of whether the qualified immunity doctrine requires a heightened pleading in cases involving individual government officials. *Leatherman*, 507 U.S. at 166-67. Additionally, although this Court noted that "[w]e think it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit *in this case* with the liberal system of 'notice pleading' set up by the Federal Rules," *Id.* 507 U.S. at 168 (emphasis added), Swift is mistaken in his belief that this Court intended to extend this sentiment to fact situations other than

that which was presented in *Leatherman*. Finally, even assuming, *arguendo*, that Swift is correct, the Fifth Circuit through its decision in *Schultea* was able to avoid any substantial conflict between "the substantive right of qualified immunity" and the Federal Rules of Civil Procedure. *Schultea*, 47 F.3d at 1433, 1434.

Argument

I. The Dismissal Of Swift's Suit Was Proper

This Court need not consider the question presented by Swift because, even if all the allegations stated in Swift's complaint are taken as true, the lower court's dismissal was proper. *Estelle v. Gamble*, 429 U.S. at 99, citing *Cooper v. Pate*, 378 U.S. 546 (1964). Swift insists that the lower court should have waited to resolve the case upon summary judgment or trial after an adequate period for discovery had elapsed. Brief at 11. However, this contention contradicts the requirement of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny that, until the threshold immunity question is resolved, no discovery should be allowed. *Seigert v. Gilley*, 500 U.S. 226, 231 (1991). Moreover, this argument is without merit because Swift could not have amended his allegations to prove any set of facts in support of his claim that he had suffered a constitutional violation by defendant Lynaugh, Executive Director of the prison system.

The facts of this case are strikingly similar to those presented in *Estelle v. Gamble*, which has been the applicable legal standard for twenty years in claims involving allegations of deliberate indifference to serious medical needs of prisoners. *See Farmer v. Brennan*, 114 S. Ct. 1970, 1978 (1994). Gamble filed a § 1983 action complaining of allegedly improper medical treatment he had received for a period of approximately two months following a back injury. *Estelle*, 429 U.S at 98-101. He named the Director of the Department of Corrections, the warden of his unit and the chief medical officer of the prison

hospital as defendants. *Id.* The lower court dismissed his complaint *sua sponte* for failure to state a claim upon which relief could be granted. *Id.* In deciding whether the defendants had shown deliberate indifference to a serious medical need of Gamble, this Court held that "an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or be 'repugnant to the conscience of mankind.' Thus, a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment." *Id*, 429 U.S. at 105-06. Gamble contended that the defendants should have pursued other methods of diagnosis. However, this Court found that such an argument "is a classic example of a matter of medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice, and as such the proper forum is the state court under the Texas Tort Claims Act." *Id.*, 429 U.S. at 107.

Finding that the appellate court should have affirmed the district court's dismissal of the case as to the chief medical officer, this Court remanded the case back to the Fifth Circuit to allow it an opportunity to consider whether a cause of action had been stated against the remaining prison officials. *Id.*, 429 U.S. at 108. On remand, the Fifth Circuit concluded that Gamble had failed to state a claim against both the Director and the Warden. *Gamble v. Estelle*, 554 F.2d 653 (5th Cir. 1977). The court dismissed the case because it found that the Director and Warden were named as parties not for having failed to provide treatment, but based on the theory of *respondeat superior* by virtue of their official capacities. *Id.*, 554 F.2d at 654. In dismissing the case, the court concluded that it could "find no evidence in the record that either exhibited 'deliberate indifference' to Gamble's medical needs by means of interference with the prison doctor's performance or in any other manner which would satisfy the Supreme Court standard." *Id.*

In the instant case, Swift conceded in the lower court that that dismissal was proper as to the two state entities and to Lynaugh in his official capacity. Therefore, the only allegation remaining was against Lynaugh in his individual capacity. However, in view of the fact that Lynaugh would have had no direct personal involvement in the incident of which Swift complains and did not interfere with the performance of medical personnel at Swift's prison unit, dismissal was clearly proper. *Id.*

Moreover, Swift's own allegations defeat a claim for deliberate indifference. Swift's complaint acknowledges that he was seen by medical personnel on May 2, 1992 at 7:30 a.m., and at 7:00 and 7:30 a.m. on May 3, 1992. Pet. App. 7-8. At 5:00 p.m. on that same day, Swift was sent by life flight to John Sealy Hospital in Galveston, Texas. Pet. App. 8. Swift alleges that the failure of unnamed medical personnel to render a "reasonable examination" caused his condition to worsen. Pet. App. 7. However, "a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment." *Estelle*, 429 U.S. at 105-06. As the magistrate judge correctly noted, "despite peppering the allegations in the complaint with the buzzwords of 'deliberate indifference', the complaint, when reduced to is simplest terms, alleges nothing more than negligence, failing to state a claim under 42 U.S.C. § 1983." Pet. App. 17.

II. The Fifth Circuit's Decision In *Schultea* Avoids A Confrontation Between The Substantive Right Of Qualified Immunity And The Federal Rules Of Civil Procedure.

Swift contends that the dismissal of his petition in the lower court was improper due to a "heightened pleading standard" which the Court of Appeals for the Fifth Circuit has continued to adhere to in spite of the holding of this Court in *Leatherman*. This contention is erroneous. In *Leatherman*, this

Court held that a federal court may not apply a "heightened pleading standard" more stringent than usual pleading requirements in civil rights cases alleging municipal liability under 42 U.S.C. § 1983. *Id.*, 507 U.S. at 167. However, in doing so, it expressly reserved consideration on the issue of whether "our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." *Id.* 507 U.S. at 166-67. Thus, the holding of *Leatherman* is applicable only to civil rights cases alleging municipal liability under § 1983.

Swift also argues that "the lower court should have awaited to resolve the case upon summary judgment or trial after an adequate period for discovery had elapsed." Brief at 11. However, such an argument is in direct conflict with the decision enunciated by this Court in *Harlow v. Fitzgerald* in which it redefined qualified immunity for government officials. *Harlow v. Fitzgerald*, 457 U.S. at 817. In doing so, the Court rejected the subjective element of the good faith defense which had been adopted in *Wood v. Strickland*, 420 U.S. 308, 321 (1975), finding that it "frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial." *Harlow*, 457 U.S. at 817. Reasoning that the litigation of the subjective good faith element had proven to involve substantial and unnecessary costs, this Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* (citations omitted). This Court explained that this new standard should "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.* Since the decision in *Harlow*, the courts have struggled with the "demands qualified immunity now makes upon the Civil Rules and, in particular, the Rules' preference for discovery over pleading." *Schultea v. Wood*, 47 F.3d at 1431. The instant case is illustrative of this struggle.

In *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985), the Fifth Circuit persuasively addressed the issues a trial court must face when confronted with an immunity defense. Acknowledging that discovery would "defeat and frustrate the function and purpose of the absolute and qualified immunity ostensibly conferred on the official," the court stated that a judge may not face an immunity case "as just another lawsuit in which the notice pleading's liberal policy of F.R.Civ.P. 8 counts on pretrial discovery to ascertain the factual basis for the claims, and as here, a defense. *Id.* at 1478. Mindful of the fact that the "public goals sought by official immunity are not procedural," but "go to very fundamental substantive objectives," the court recognized that a trial court "must find a way to adapt its procedures to assure full effectuation of this substantive right, since the Enabling Act provides that the rules shall not abridge, enlarge or modify and substantive right." *Id.* at 1479 (citations omitted).[2]

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[2] Justice Kennedy in his concurring opinion in *Seigert* expressly embraced the use of heightened pleading to accommodate the substantive defense of qualified immunity.

> The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.

Seigert, 500 U.S. at 235 (Kennedy, J., concurring).

Judge Jones, in her concurrence in *Schultea* also found that the "substantive immunity afforded public officials to free them from the burdens of litigation cannot be abrogated by a rule of civil procedure. . . To the extent of any conflict, Rules 8 and 9(b) must yield to vindication of the defense of immunity." *Schultea*, 47 F.3d at 1436 (Jones, J., concurring).

Placing the burden of determining whether a viable immunity defense has been presented "squarely on the judge," the court enumerated certain procedural "tools" that could be used; namely newly-amended Rules 11 and 16 of the Federal Rules of Civil Procedure, as well as a Rule 12(e) motion for more definite statement. *Id.* at 1480, 1481, 1482 n 25. It relied in particular on the stringent requirements of Rule 11, which require a plaintiff's attorney to affirm that, after making reasonable inquiry, "he believes in good faith that the defendant official cannot successfully show he has the defense of immunity. This means also that having that good faith belief, he is able to state with some particularity what those facts are." *Id.* at 1481-82. Thus, the *Elliott* court required a plaintiff to anticipate an immunity defense in his petition.

Subsequent to *Elliott*, the decision in *Leatherman* was reached. As stated in *Leatherman*, the issue of whether "our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials" was expressly reserved. *Leatherman*, 507 U.S. at 166-67. This Court also noted that "[w]e think it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit *in this case* with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.*, 507 U.S. at 168 (emphasis added). Swift contends that the Fifth Circuit has ignored this holding in *Leatherman*. However, the language used by this Court makes it clear that the language regarding a conflict between the heightened pleading standard and the Federal Rules of Civil Procedure was confined to the fact situation presented in *Leatherman*. Even assuming, *arguendo*, that Swift's contention is correct, the Fifth Circuit in *Schultea* re-examined *Elliott* in light of the continued evolution of qualified immunity and, in doing so, found the means to avoid this predicament.

Writing for the majority, Judge Higginbotham emphasized that "[t]he confrontation we saw in 1984 [in *Elliott*] is not the confrontation today." *Schultea*, 47 F.3d at 1434.

Once again, the court employed the same approach it had in *Elliott*, and utilized procedural tools to "assure full effectuation of this substantive right." *Elliott*, 751 F.2d at 1479. While maintaining its requirement that "complaints plead more than conclusions," the court no longer insisted that a plaintiff fully anticipate the defense in his complaint at the risk of a dismissal under Rule 12. The court turned to Rule 7 of the Federal Rules of Civil Procedure, which allows a district court to require a plaintiff to reply in detail and with particularity to a defendant's motion to dismiss on qualified immunity grounds. *Schultea*, 47 F.3d at 1433.

> First, the district court must insist that a plaintiff suing a public official under § 1983 file a short and plain statement of his complaint, a statement that rests on more than conclusions alone. Second, the court may, in its discretion, insist that a plaintiff file a reply tailored to an answer pleading the defense of qualified immunity. Vindicating the immunity doctrine will ordinarily require such a reply, and a district court's discretion not to do so is narrow indeed when greater detail might assist. The district court may ban discovery at this threshold pleading stage and may limit any necessary discovery to the defense of qualified immunity. The district court need not allow any discovery unless it finds that plaintiff has supported his claim with sufficient precision and factual specificity to raise a genuine issue as to the illegality of defendant's conduct at the time of the alleged acts. Even if such limited discovery is allowed, at its end, the court can again determine whether the case can proceed and consider any motions for summary judgment under Rule 56.

Id. at 1433-34.

Thus, Swift is clearly in error when he contends that the decision reached by the court in *Schultea* ignores the reasoning of *Leatherman*. By using Rule 7 and avoiding the use of Rule 9's particularity requirements, the court was able to circumvent the dilemma identified in *Leatherman*. Thus, it did not address the issue of whether "the substantive right of qualified immunity supplants the Federal Rule's scheme of pleading by short and plain statement." *Id.* at 1433. "The ultimate outcome of a confrontation between Rule 9(b) and qualified immunity, we no longer need to decide and we do not." *Id.* at 1434.

III. Broad Ranging Discovery Is Not Favored in Qualified Immunity Suits

Finally, Swift's argument that the lower court should have allowed discovery is not in accordance with this Court's decisions. As already noted, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 817 (citations omitted). The question of qualified immunity arose subsequent to *Harlow* in *Anderson v. Creighton*, 483 U.S. 635 (1987). Noting that "[o]ne of the purposes of the Harlow qualified immunity standard is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government,'" this Court emphasized that "qualified immunity questions should be resolved at the earliest possible stage of a litigation," and, if discovery is found to be necessary, it "should be tailored specifically to the question of [defendant's] qualified immunity." *Id*, 483 U.S. at 646 n. 6 (citations omitted).

This court subsequently granted certiorari in *Seigert v. Gilley*, 500 U.S. at 231, in order to "clarify the analytical structure under which a claim of qualified immunity should be addressed." In so doing, it once again emphasized the message of *Harlow* that "[u]ntil this *threshold* immunity question is

resolved, discovery should not be allowed." *Id.* In order for a judge to resolve this question , he must determine both what the currently applicable law is and whether the constitutional right asserted by a plaintiff is "clearly established" when the event occurred. *Id.* "Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on its merits." *Id.*

Swift was given an opportunity by the court to engage in discovery concerning the question of qualified immunity, but declined to do so. App. A-3. It appears that Swift wanted to conduct "broad-ranging" discovery prior to the qualified immunity question being resolved. However, as already discussed, this is contrary to the holdings of this Court. Accordingly, Swift's contention in this regard is without merit

Conclusion

For the reasons set forth above, the Respondents herein submit that a writ of certiorari should not be granted in this case.

Respectfully submitted,

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